**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 | ) | MB Docket No. 14-50 |
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| 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 | ) | MB Docket No. 09-182 |
| | ) | |
| Promoting Diversification of Ownership In the Broadcasting Services | ) | MB Docket No. 07-294 |
| | ) | |
| Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets | ) | MB Docket No. 04-256 |

# OPPOSITION TO RECONSIDERATION

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# OPPOSITION TO RECONSIDERATION

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## I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") submits this Opposition in response to the Petitions for Reconsideration ("Petitions") of the National Association of Broadcasters ("NAB") and Nexstar Broadcasting, Inc. ("Nexstar") (jointly, "Petitioners") in the above captioned proceedings to the extent that Petitioners request reconsideration of the Commission's decision to retain the Local Television Ownership Rule, consisting of numerical limits (no more than two stations per owner), a prohibition on combinations of two or more top-four rated stations ("Top-

Four Prohibition"), and a prohibition on duopoly ownership in a market unless at least eight independently owned commercial and non-commercial television stations remain in the market post-transaction ("Eight Voices Test"), with minor modifications, and the Commission's decision to re-adopt its Television Joint Sales Agreement ("JSA") Attribution Rule.[1] The Commission's decision to retain the core components of the Local Television Ownership Rule was premised on its view that the rule continues to serve an essential purpose in protecting competition among broadcast television stations in their designated market areas. Its re-adoption of the Television JSA Attribution Rule was premised on the Commission's desire to close a loophole that was undermining the effectiveness of the ownership rule by allowing stations that should have been operating independently to collaborate, suppressing local competition.

Petitioners seek elimination of the Top-Four Prohibition and the Eight Voices Test to permit common ownership of more than one station and two of the top-four rated stations in all local markets.[2] Their base case for reconsideration rests on arguments that competitive developments in the media marketplace have eliminated any justification for retaining the Local Television Ownership Rule, that the Commission has ignored their evidence and analysis and that it either erred in its decisions or had no rational basis for them.[3] Petitioners also seek

[1] *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, 31 FCC Rcd 9864 (2016) ("2016 Order"); *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Petition for Reconsideration of the National Association of Broadcasters (filed Dec. 1, 2016) ("NAB Petition"); Petition for Reconsideration of Nexstar Broadcasting, Inc. (filed Dec. 1, 2016) ("Nexstar Petition"). An additional Petition for Reconsideration was filed on Dec. 1, 2016 by Connoisseur Media, LLC ("Connoisseur Media"). ACA takes no position on Connoisseur Media's Petition for Reconsideration and confines its Opposition to the Petitions filed by NAB and Nexstar.

[2] *See* NAB Petition at iv; Nexstar Petition at 4.

[3] NAB Petition at 1-2; Nexstar Petition at 4. Petitioners specifically challenge three aspects of the Commission's decision to retain the Local Television Ownership Rule and its central components. First, they take issue with the Commission's identification of the relevant market for purposes of assessing the continued need for the broadcast ownership restrictions, arguing that the Commission erred in concluding that broadcast television stations compete only against one another. NAB Petition at 1-5; Nexstar Petition at 4-9; 13-15. Second, they argue that the Commission's retention of the Top-Four Prohibition was unsupported by logic and evidence. NAB Petition at 8-11; Nexstar Petition at 9-11. Third, they

reconsideration of the Commission's decision to attribute JSAs to allow separately owned, same market stations to circumvent the Top-Four Prohibition and the Eight Voices Test in local markets. They argue that the Commission's ruling improperly made the ownership rule more stringent, ignored evidence of the public interest benefits produced by JSAs submitted by Nexstar, wrongly concluded that these arrangements confer ownership control and misapplied relevant Commission precedents.[4]

To warrant reconsideration, Petitioners cannot "rely on arguments that have been fully considered and rejected by the Commission within the same proceeding," nor can they rely on arguments that "fail to identify any material error, omission or reason warranting reconsideration."[5] Because their Petitions suffer from these failings, Petitioners' requests for reconsideration should be denied or dismissed. In the 2016 Order, the Commission carefully weighed and rejected arguments that the relevant market should be broadened to include non-broadcast offerings because it found they do not serve as meaningful substitutes for local broadcast television.[6] Next, the Commission considered and rejected arguments that the Top-Four Prohibition should be eliminated because multiple ownership of top-four rated stations in a market would not lessen local competition or create welfare harms.[7] The Commission considered but rejected arguments that the Eight Voices Test lacks a factual or economic basis

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argue that the Commission decision to retain the Eight Voices Test was unsupported by evidence and lacking a rational economic foundation. NAB Petition at 5-8; Nexstar Petition at 11-12.

[4] NAB Petition at 11-13; Nexstar Petition at 15-24.

[5] Examples of petitions for reconsideration under Section 1.429 of the Commission's Rules "that plainly do not warrant consideration by the Commission," include those that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding" and those that "[f]ail to offer any material error, omission, or reason warranting reconsideration." 47 U.S.C. § 1.429(l)(1), (3).

[6] 2016 Order, ¶¶ 25-30 (citing record evidence showing that non-broadcast offerings do not respond to local competitive conditions).

[7] *Id.*, ¶¶ 40-44 (record evidence that top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms, undermining competition among broadcasters in the local television market for both advertising and retransmission consent fees).

and is no longer necessary to ensure robust competition in local television markets.[8] Finally, based on its decision that retention of its Local Television Ownership Rule continued to be necessary in the public interest, the Commission re-adopted its 2014 decision to attribute television JSAs and, in so doing, considered and rejected arguments that JSAs should not be considered attributable ownership interests because they produce public interest benefits, and that attribution of television JSAs required alteration of the ownership limits themselves.[9]

Petitioners bring nothing new to the table on any of these issues that supports reconsideration, largely rehashing arguments from their previous filings that have been thoroughly considered and rejected by the Commission. Their attempts to find material errors or omissions in the Commission's reasoning amount to little more than disagreements with the Commission's assessment of the relevance of and weight to be accorded to evidence presented in support of their requests for elimination or loosening of the Commission's local television ownership restrictions. Reconsideration of the Commission's long overdue conclusion of its 2010 and 2014 quadrennial ownership reviews under these circumstances is not warranted.[10]

In considering the Petitioners' request to relax the Local Television Ownership Rule through reconsideration, the Commission must also take account of the impact of such rule changes on the marketplace, particularly the retransmission consent market, and on consumers. Broadcasters already have significant market power in retransmission consent

[8] *Id.*, ¶¶ 53-59 (evidence and analysis showing that greater consolidation in markets with fewer than eight independent voices following a merger would present serious harms to diversity and competition).

[9] *Id.*, ¶¶ 60-64 (incorporating by reference the rationale articulated in that decision for the adoption and application of the rule, that JSAs confer influence and control over one station to another, and therefore should be considered as ownership interests); *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, ¶¶ 340-72 (2014) ("2014 FNPRM" or "2014 JSA Order").

[10] To the extent NAB and Nexstar believe further loosening of the Commission's local television ownership restrictions is justified, they will have the opportunity to present their case anew to the Commission as it looks to initiate its 2018 quadrennial ownership review. In the alternative, NAB and Nexstar may file petitions for rulemaking seeking the same changes outside the four-year cycle of congressionally mandated quadrennial reviews of the Commission's media ownership rules.

negotiations with multichannel video programming distributors ("MVPDs"), especially smaller MVPDs. This significant market power is derived in large part from consolidation in the broadcast industry, outdated broadcast carriage rules and a cold-hearted willingness to pull signals from MVPDs and customers. Broadcasters have benefited from their market power for more than a decade by extracting skyrocketing retransmission consent fees, which have seen 40% annual increases over the last three years, with no end in sight.[11] SNL Kagan predicts that retransmission consent fees could nearly double in the next five years, to $11.6 billion.[12] It is the consumers who absorb these rate increases that are harmed, and must suffer through record numbers of blackouts – nearly 300 over the last two years, and just weeks into 2017, reports of 75 more.[13] The Commission's current good faith negotiation rules, while necessary to cabin bargaining behavior, have not been sufficient to constrain these problems.

Permitting ownership of more than one top-four rated station in a market, and duopoly ownership in every market, regardless of the number of local television "voices" in the market, as Petitioners seek through reconsideration, would exacerbate the harms to the public interest of an already broken marketplace for retransmission consent by reducing broadcast station competition for retransmission consent fees, and harm consumers and MVPDs through even higher prices and more harmful blackouts. The Commission, the U.S. Department of Justice ("DOJ") and Congress have recognized that joint retransmission consent negotiations of separately owned, same market stations allow network-affiliated broadcasters to extract higher fees for each station than either could command by negotiating separately, and have therefore

[11] Press Release, American Television Alliance, Bonten Media Group Pulls Plug on Consumers in 8 States (Jan. 20, 2017), *available at* https://www.americantelevisionalliance.org/bonten-media-group-pulls-plug-on-consumers-in-8-states/ ("According to an ATVA analysis of publicly available industry data and SNL Kagan data, fees have grown an astonishing 22,400% [no, that's not a typo] since 2005.").

[12] *Id.* (analyzing SNL Kagan data on price increases and showing that retransmission consent fees are the fastest rising part of programming costs).

[13] *Id*.

prohibited such negotiations.[14] This harm does not only occur when the stations in the same market are under separate ownership, which is a prohibited practice, but would also occur if joint negotiations occurred with same market stations that are commonly owned. Since there is no prohibition on broadcasters simultaneously negotiating retransmission consent for two stations they *own* in one market, relaxing or eliminating the elements of the Local Television Ownership Rule so that a single broadcaster can own more than one major network-affiliated station in the market will result in broadcasters extracting higher retransmission consent fees and causing more harmful blackouts. As MVPDs are already reeling from broadcasters' exercise of market power under existing ownership rules, relaxation of these rules would only make a very bad situation far, far worse. These effects would be most strongly felt by ACA's smaller MVPD members, who already lack leverage in retransmission consent negotiations with broadcast station groups, in the form of shrinking video margins and subscriber losses.[15]

Reconsideration of the Commission's decision to attribute television JSAs would compound the problem further, by validating a mechanism by which broadcasters that are supposed to be competing instead have been closely coordinating their revenue-generating activities for years, thereby evading and undermining the Commission's ownership limits.

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[14] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) ("2014 Joint Negotiation Order") (prohibiting joint negotiation by non-commonly owned, top-four rated stations in a market); *United States v. Nexstar Broadcasting Group, Inc., and Media General, Inc.,* Competitive Impact Statement (D.D.C. filed Sept. 2, 2016) ("DOJ Nexstar-Media General Competitive Impact Statement"); Complaint (D.C.C. filed Sept. 2, 2016) ("DOJ Nexstar-Media General Complaint") (recognizing harm to competition by joint negotiation of retransmission consent for two Big Four network-affiliated stations and requiring divestitures); STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (2014) ("STELAR") (directing the Commission to prohibit joint negotiations for all non-commonly owned stations in the same market).

[15] The Commission's Media Bureau recently recognized that "MVPD subscriber losses of the last few years have been driven by the 'increasingly elusive affordability of the legacy multichannel package and the fast-expanding availability of professional content outside the traditional channel bundle on legacy multichannel video delivery platforms.'" *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, ¶ 68 (rel. Jan. 17, 2017), *citing* SNL Kagan, Broadband Financial Databook at 5 (2016); *id.,* ¶ 72, *citing* SNL Kagan, Cable TV Investor at 12-13 (Mar. 29, 2016).

Agreements to share services, such as the sale of advertising by competing local broadcast stations, can result in efficiencies, but the close coordination they facilitate can also provide a shield behind which covert cooperation on pricing, that would be prohibited if made explicit, can occur. By recognizing television JSAs as establishing ownership interests, the Commission can better police broadcaster behavior and enforce its limits. Elimination of this attribution would facilitate the ability of broadcasters to engage in covert coordination of retransmission consent pricing, a result that cannot be squared with the public interest or the Commission's statutory obligations under Section 202(h).

## II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE COMMISSION'S DECISION TO RETAIN THE LOCAL TELEVISION OWNERSHIP RULE SHOULD BE RECONSIDERED

In establishing and thereafter reviewing and updating its ownership and attribution rules, the Commission considers its "fundamental goals" of "competition, localism, and diversity."[16] The Local Television Ownership Rule preserves local broadcast competition by allowing an entity to own two television stations in the same Nielsen Designated Market Area ("DMA") only if at least one of the commonly owned stations is not ranked among the top-four stations in the market (the "Top-Four Prohibition")[17] and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined (the "Eight Voices Test").[18] Based on the combined record compiled in its 2010 and 2014 Quadrennial Review proceedings, the Commission found that the rule, with limited modifications, "remains necessary to promote competition," and "will continue to promote viewpoint diversity by helping to ensure the presence

[16] *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 5 (2011) ("2010 Quadrennial Review NPRM").

[17] 47 C.F.R. § 73.3555(b). The rule also prohibits a broadcaster from owning another station where there is a contour overlap. The rule previously prohibited ownership of stations whose Grade B contour overlapped within the same DMA, but the 2016 Order changed the signal area measure for determining overlap from the analog Grade B contour to the digital noise limited signal contour. 2016 Order, ¶¶ 32-33.

[18] 47 C.F.R. § 73.3555(b).

of independently owned broadcast television stations in local markets and is consistent with our localism goal as competition also incentivizes television stations to select programming responsive to the interests and needs of the local community."[19] NAB and Nexstar seek reconsideration of this decision on the grounds that it was based on an unduly narrow definition of the relevant market that considers competition only among local broadcasters to be relevant, and that retention of both the Top-Four Prohibition and Eight Voices Test is not supported by the evidence or economic analysis. Reconsideration of these decisions is not warranted.

### A. Petitioners Have Not Made the Case for Reconsideration of the Commission's Determination that the Relevant Market for Evaluation of the Local Television Ownership Rule is the Local Broadcast Television Market.

In support of reconsideration, Petitioners reprise arguments that the Commission has failed to take adequate account of the fact that competitive developments, including the proliferation of video programming and news and information providers such as traditional MVPDs, newer online video distributors using Internet-based distribution and consequent changes in media consumption, have eliminated any justification for retention of the Local Television Ownership Rule, rendering the Commission's decision to retain the rule contrary to statute, arbitrary and capricious.[20] Achieving a more broadly defined market is key to Petitioners' arguments that the ownership restrictions themselves should be relaxed to permit duopolies in every market, including those involving two top-four rated stations. Yet, despite their strenuous protestations about market definition, Petitioners fail to advance any facts, analysis or arguments concerning market definition not already fully considered and rejected by

[19] 2016 Order, ¶ 17; *see* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); 2010 Quadrennial Review NPRM, ¶ 26; 2014 FNPRM, ¶ 15; *see also 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.,* Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, ¶ 87 (2008) ("2006 Quadrennial Review Order").

[20] NAB Petition at 1-5; Nexstar Petition at 4-9; *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Comments of the National Association of Broadcasters, at 9-31 (filed Aug. 6, 2014) ("NAB FNPRM Comments"); Comments of Nexstar Broadcasting, Inc., at 5-11 (filed Aug. 6, 2014) ("Nexstar FNPRM Comments").

the Commission. It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.[21]

In reaching its decision that the Local Television Ownership Rule continues to be necessary to promote competition among broadcast stations in local television viewing markets, the Commission considered, and rejected, arguments that it should broaden its definition of the relevant market to include non-broadcast video offerings such as online, cable and DBS video offerings.[22] The Commission acknowledged Nexstar's argument that the Commission's rules should ensure that local broadcasters, especially those serving in smaller markets, have the opportunity to compete effectively with other video content providers, and acknowledged NAB's argument that competition for audiences and advertisers from other sources of video – such as MVPDs and Internet and mobile video providers – creates adequate competitive pressures so that the harms associated with local broadcast consolidation do not occur.[23] Nonetheless, the Commission found that the record supported the opposite conclusion, that non-broadcast video offerings *do not* serve as meaningful substitutes for local broadcast television; rather, it is competition within a local market amongst broadcasters that motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and

[21] *See, e.g.*, *Regents of the University of California*, Order, 17 FCC Rcd 12891, ¶ 2 (2002), *citing Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667, ¶ 2 (1988) and *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, ¶ 7 (1987).

[22] 2016 Order, ¶ 25, *citing* Nexstar FNPRM Comments at 6, 9-10; NAB FNPRM Comments at 41; *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Comments of Stainless Broadcasting, L.P *et al* at 2 (filed Aug. 6, 2014).

[23] 2016 Order, ¶ 25; Nexstar FNPRM Comments at 7; NAB FNPRM Comments at 47-50; *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Reply Comments of the National Association of Broadcasters, at 3 (filed Sept. 8, 2014); Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (filed June 6, 2016).

interests of the local community in order to gain market share.[24] It is, accordingly, evident that Petitioners' arguments are based on points advanced and rejected in this rulemaking.

Even to the extent Petitioners attempt to demonstrate errors or omissions in the Commission's reasoning based on supposedly "ignored" and turned a "blind eye" to evidence, they simply rehash matters addressed and rejected in the Order.[25] These assertions are belied by an examination of the Commission's findings and conclusions, which are based on a careful examination of the relevance and weight to be accorded evidence in the record, including evidence and analysis submitted by Petitioners. As discussed above, the Commission did not turn a blind eye to new media sources; rather, it explained why they were not relevant to its analysis of competition among local broadcasters.[26] In light of broadcast television's strong position in local advertising markets, the Commission reasonably reaffirmed its conclusion that non-broadcast video programming distributors are not meaningful substitutes in local television markets.[27] The Commission considered, but rejected, a market definition study submitted by

[24] 2016 Order, ¶ 26. In support of its conclusion, the Commission cited several factors, including the key facts that although programming from non-broadcast video sources may be popular, competition from such providers is of limited relevance to its analysis, as the content is not tailored to local markets and the significant role local stations play in local advertising, particularly with respect to political advertising. In addition, the Commission cited the facts that no commenter had offered evidence of non-broadcast video programmers modifying their programming decisions based on the competitive conditions in a particular local market, that ten percent of Americans still lack sufficient broadband access and that broadcast television remains the primary source of local news and public interest programming. *Id.*, ¶¶ 26-28, 30.

[25] NAB asserts that the Commission failed to respond to its argument, failed to adequately support its own argument, and ignored record evidence showing the growing impacts on local broadcast stations of non-broadcast video sources. NAB Petition at 2. Similarly, Nexstar argues that the Commission acted arbitrarily and capriciously by turning a "blind eye" to significant market changes undermining the bases for its broadcast ownership restrictions, and "inexplicably" finding that although new media sources are popular, they are of "'limited relevance'" to its analysis. Nexstar Petition at 6-10.

[26] The Commission also considered and rejected NAB's argument that advertisers do not distinguish between local broadcast and non-broadcast sources in advertising spending, finding that available data does not support this claim, as local broadcasting advertising revenue remains strong and is projected to grow through 2019. 2016 Order, ¶ 28, *citing* Pew Research Center, State of the News Media 2015, at 46 (2015), *available at* http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf. Although NAB takes issue with whether the Commission has relied on current data, it fails to show that reliance on the data is a material error or omission, or otherwise warrants reconsideration. *See* NAB Petition at 4, n.12.

[27] 2016 Order, ¶ 28.

NAB purporting to demonstrate that the market definition relied by the Commission is flawed, finding the study neither relevant nor informative "for multiple reasons" and concluding that it "does not inform the current proceeding."[28] On this basis, the Commission reaffirmed that its market definition for purposes of the Local Television Ownership Rule would remain local broadcast television and, contrary to broadcasters' arguments, would continue to be premised on multiple factors, including both advertising and audience share.[29]

NAB's Petition does not even attempt to explain its claim that the specific reasons supplied by the Commission for rejecting the study are "illogical and unmeritorious." Rather, NAB concludes, without any basis, that rejection of the study just shows the Commission's reluctance to consider evidence contrary to its conclusions about competition in the video marketplace.[30] The Commission obviously gave full consideration to NAB's study before rejecting the its methodology and conclusions. It simply did not find the study convincing or relevant for purposes of defining the relevant market. To the limited extent Petitioners have raised new arguments, they have not demonstrated on the merits that the Commission's determination that local broadcast television remains the relevant product market was the product of a material error or omission.

### B. Petitioners Have Failed to Demonstrate that Reconsideration of the Decision to Retain the Top-Four Prohibition is Warranted.

Nexstar and NAB contest the Commission's decision to retain the Top-Four Prohibition, which prevents common ownership of two or more of the top-four rated stations in any local market, arguing it rests upon outdated findings and flawed assumptions regarding commonly

[28] *Id*., ¶ 29. The Commission cited, *inter alia*, significant issue with the statistical methods and interpretation of results, imprecise measurements of JSAs/SSAs rendering the results unreliable and based on a market definition more narrow than that used by it for media ownership purposes. The study, Kevin Caves and Hal Singer, Economists Incorporated, *Competition in Local Broadcast Television Advertising Markets* (Aug. 6, 2014), was submitted as Attachment A to NAB's FNPRM Comments.

[29] *Id*.

[30] NAB Petition at 4-5.

owned stations.[31] Here, Petitioners again merely recycle arguments that the Commission has already considered and rejected, and fail to satisfy the grounds for reconsideration.

The Commission has already fully considered and rejected Petitioners' arguments that retention of the prohibition rests on outdated findings and flawed assumptions and that combinations of two top-four stations would enhance, not undermine, competition.[32] First, the Commission was not persuaded by NAB's argument that revenues, rather than audience share, are the appropriate metric, reaffirming its conclusion that the "public is best served when numerous rivals compete for viewing audiences" because they profit by attracting new audiences and diverting viewers away from competitors' programs, making them more likely to improve program quality and create programming preferred by existing viewers.[33] Accordingly, it found unpersuasive NAB's assertions regarding the revenue of fourth- and fifth-ranked stations in a market because NAB focused on revenues without sufficiently examining audience share, which the Commission utilizes when evaluating the need for the Top-Four Prohibition.[34]

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[31] Nexstar takes issue with the Commission's "'belief'" that top-four combinations would "generally'' result in excessive market share and incentivize rivals to coordinate programming in order to minimize competition between commonly owned stations, arguing there is scant supporting such record evidence. Nexstar Petition at 9-10. NAB complains that the Commission's justification for the prohibition is based on the supposed existence in "most" markets of a "significant cushion" of audience share points separating the top-four stations in a market from the fifth-ranked station, and on the related claim that combinations among top-four rated stations would produce one firm with a significantly larger market share that is unsupported by current data. NAB Petition at 8-11.

[32] 2016 Order, ¶ 42, *citing* NAB FNPRM Comments at 51-54 (revenue data show that there are no significant breaks between the fourth- and fifth-ranked stations in a market such that retention of the prohibition is arbitrary; combinations of two top-four stations would enhance competition); *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 5-6 (filed June 21, 2016); Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, at 2 (filed June 14, 2016); Nexstar FNPRM Comments at 11-13 (common ownership leads to investments in better programming and therefore, the prohibition, which is based on outdated findings and flawed assumptions is detrimental to promoting the public interest).

[33] 2016 Order, ¶ 43, *citing 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 188 (2003).

[34] *Id.*, ¶ 43 (finding that the ability to attract mass audiences distinguishes the top ranked stations in local television markets, which is why ratings is an appropriate basis for the top-four prohibition; "Therefore,

NAB attempts to point out omissions in the Commission's analysis, arguing that it failed to identify the number of markets in which this cushion existed in 2012, how large the cushion actually was, how the cushion compared to ratings cushions between other stations, or how the Commission made its determination that the cushion qualified as "significant."[35] Yet NAB fails to demonstrate that any of these purported failures is material to the Commission's decision that the Top-Four Prohibition, a bright-line rule of general applicability, remains necessary to promote competition in the local television marketplace.[36] NAB's evident disagreement with the Commission's continued reliance on an audience share metric and its assessment using this metric that permitting top-four combinations would be particularly injurious to competition is not grounds for reconsideration.[37]

Nexstar and NAB also challenge the Commission's determination that top-four combinations would generally result in a single firm obtaining a significantly larger market share than other firms, reducing incentives for improvement in programming.[38] Here again, there is nothing new presented. The Commission considered, but was "not persuaded by Nexstar's assertions that commonly owned stations have no incentive to coordinate their programming

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NAB's evidence does not disturb the Commission's previous determinations" that audience share remains the relevant metric for the Top-Four Prohibition and "does not rebut evidence in this proceeding that a cushion still exists between the fourth- and fifth-ranked stations in most markets.").

[35] NAB Petition at 8-9. The Commission's analysis rests on data from 2012.

[36] As discussed further *infra*, the Commission specifically noted that the "Local Television Ownership Rule is a bright-line rule designed to promote competition. Accordingly, our analysis focuses on concepts that are generally applicable across all markets." 2016 Order, ¶ 64, n.175.

[37] NAB makes the additional argument that even if a "significant" ratings cushion exists between the fourth- and fifth-ranked stations in two-thirds of markets with at least five full powered commercial stations, it would not make a blanket top-four restriction rational for all markets. NAB Petition at 9. NAB notes that the prohibition would either be inappropriate or irrelevant for many smaller markets with fewer stations, based upon the Commission's breakpoint rationale, even assuming local stations ratings today followed 2012 patterns. *Id*.

[38] 2016 Order, ¶ 44. Nexstar and NAB argue that the Commission's determination lacks logic and evidentiary support as it assumes that an owner of two stations has less incentive to maximize its audiences, and thus its advertising revenues and profits, than the owner of a single station. *Id.*, ¶ 43; NAB Petition at 9-10; Nexstar Petition at 9-11.

based solely on anecdotal showings from Nexstar-owned stations in two DMAs."[39] NAB's complaint that the retention of a blanket top-four restriction is arbitrary and capricious rests on its argument that the Commission failed to consider its empirical evidence that combinations among top-four rated stations (other than a combination of the top-two) "very frequently do *not* result in an entity with an audience or revenue share 'significantly' larger (or even equal to) the share of the top station."[40] Yet NAB also appears to acknowledge that the Commission has already considered, but rejected, its argument that revenue data should be considered relevant to the market competition analysis, which also undergirds the Commission's determination concerning combinations of top-four rated stations.[41] The Commission's decision to retain a prohibition of general applicability despite anecdotal evidence concerning markets that do not exhibit the characteristics upon which the prohibition is premised cannot be considered arbitrary and capricious. The Commission specifically noted that the "Local Television Ownership Rule is a bright-line rule designed to promote competition" so that its analysis focuses on concepts applicable across all markets.[42] The Commission is not bound to reconsider its decisions on the basis of arguments fully considered and rejected, as in this instance, nor is reconsideration

[39] 2016 Order, ¶ 44. The Commission was persuaded, however, by other record evidence supporting its conclusion that "[t]op-four combinations reduce incentives for local stations to improve their programming by giving once strong rivals incentives to coordinate their programing in order to minimize competition between commonly owned stations." *Id.*, *citing 2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Comments of the American Cable Association, at 6 (filed Aug. 6, 2014).

[40] NAB Petition at 10.

[41] *Id.* at 10, n.26.

[42] 2016 Order, ¶ 64, n.175. The Commission further observed that broadcast commenters, including NAB, had expressed support for this approach, "noting that a bright-line rule provides transaction participants with greater certainty and predictability, which in turn reduces transaction costs and expedites the Commission's review process." *Id.*, *citing 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MB Docket No. 09-182, Comments of the National Association of Broadcasters (filed Nov. 20, 2009). The Commission's rules provide for waivers in individual cases upon an appropriate showing that the public interest would not be served in a particular instance by application of a bright line rule. 47 C.F.R. § 1.3.

warranted where, as here, Petitioners have failed to show that any purported errors or omissions are material.

Moreover, from a policy perspective, the Commission's decision to retain the Top-Four Prohibition is undoubtedly correct, and changing course would exacerbate the ills of an already broken marketplace for retransmission consent negotiations by increasing the already substantial bargaining leverage enjoyed and employed by broadcasters against MVPDs and their customers, leading to even higher prices and more blackouts while stifling investment in better and community-based programming.[43] The DOJ recently reaffirmed the need to preserve competition for both advertising and retransmission consent in local markets by prohibiting duopoly ownership of top-four rated stations by Nexstar, following its acquisition of Media General, finding that the affected local stations, each of which was affiliated with one of the Big Four major national televisions networks (typically, the top-four rated stations in a market), to be at least partial substitutes and vigorous competitors.[44] Common ownership of such stations would, in turn, strengthen Nexstar's bargaining position against both advertisers and MVPDs, leading to harmful, higher advertising rates and retransmission consent fees than Nexstar could otherwise obtain negotiating solely on behalf of one top-four station.[45] For that reason, DOJ required divestiture of seven Big Four-affiliated broadcast stations in six markets in order for

[43] 2016 Order, ¶ 26. Indeed, the Order notes that Nexstar explicitly argued that common ownership of top-four stations will maximize station owners' revenues from advertising and retransmission consent. *Id.*, ¶ 42. That maximization most likely derives from the suppression of competition among the stations, rather than from improved programming offerings.

[44] *See* DOJ Nexstar-Media General Competitive Impact Statement, ¶¶ 27-29 (the proposed merger would substantially increase the concentration levels in each of the DMA markets by combining television stations that are at least partial substitutes and vigorous competitors in markets with limited alternatives, harming advertisers dependent on competition between the stations and diminishing competition in retransmission consent negotiations with MVPDs).

[45] DOJ specifically mentioned the decrease in an MVPD bargaining power post-merger in the face of "a dual blackout of major broadcast networks (or worse), as result more likely to cause MVPDs to lose subscribers and therefore accede to Nexstar's retransmission fee demands." For these reasons, "loss of competition between the Nexstar and Media General [Big 4] stations in each market would likely lead to an increase in retransmission fees in those markets, and because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees."). *Id.*, ¶ 9.

Nexstar to proceed with its merger. The DOJ's reasoning with respect to retransmission consent is identical to the reasoning that had earlier led the Commission to prohibit joint negotiations by non-commonly owned top-four rated stations in the same market.[46] Congress subsequently ratified this determination in STELAR, directing the Commission to prohibit *all* joint retransmission consent negotiations by non-commonly owned, same market stations.[47] The same competitive considerations support retention of the Top-Four Prohibition to preserve and promote competition among broadcasters that already have significant market power in local television markets and protect the public against excessive advertising rates and retransmission consent fees.

### C. Petitioners Have Failed to Demonstrate That the Eight Voices Test Should Be Reconsidered.

The Eight Voices Test preserves competition by prohibiting duopoly ownership in most smaller television markets by requiring the presence of at least eight independent "voices" before any common ownership is permitted. Elimination of this rule on reconsideration, particularly if coupled with relaxation of the Top-Four Prohibition, would permit duopoly ownership in every market in the nation, even those with as few as four television stations. NAB and Nexstar fail to make the case for reconsideration because their arguments that the Commission's decision to retain the Eight Voices Test is flawed on the grounds that it lacks any economic or other foundation[48] rest on arguments advanced and rejected by the Commission

[46] *See* 2014 Joint Negotiation Order, ¶¶ 10-11. The Commission concluded that although joint negotiation among any two or more separately owned stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those resulting if the stations competed against each other, with top-four stations, the Commission was even more confident that with top-four rated stations, the harms from joint negotiation would outstrip any efficiency benefits identified. *Id.*

[47] *See* STELAR, § 103(a).

[48] NAB Petition at 5-6 (test is unrealistic and unsupported by empirical evidence or convincing rationale); Nexstar Petition at 3, 11 (no evidence provided that any particular number of stations in a market will lead broadcasters to provide increased local programming, making the selection of "eight" as the right number of voices arbitrary; fewer than 100 designated market areas have a sufficient number of "voices" to allow ownership of two television stations under the present rule, yet there is no evidence that stations in these markets compete less fiercely than those in markets with more stations).

and fail to demonstrate any material error or omission. Petitioners argue that the Order's decision not to modify the Eight Voices Test is improper because the Commission's rationale to retain the rule as-is is unsupported.[49] However, the Commission's decision to retain the Eight Voices Test was based on its foundational assessment that there have not "been any changes in the local television marketplace that would warrant modification of the eight-voices test at this time."[50] The Commission found probative, as it had in the past,[51] the fact that its rule had preserved competition in nearly every market with eight or more full-power television stations with at least four independent competitors unaffiliated with a Big Four network, a condition essential to motivating the stations to improve their programming, including increasing local news and public interest programming.[52]

In arriving at its conclusion that there were no changes to the local television marketplace justifying duopoly ownership in smaller markets, the Commission noted that although "[c]ommenters generally have asserted only that competition from non-broadcast programming has changed," it does not find it appropriate to consider competition from non-broadcast sources for the purpose of evaluating whether the rule remains necessary.[53] Contrary to Nexstar's arguments that the Commission's test is arbitrary, the courts have recognized that in choosing the number eight and defining what "voices" count, the Commission is engaging in a permissible line-drawing exercise based on its expertise in projecting market

[49] *See, e.g.,* NAB Petition at 6 ("[T]he Order … fails to offer a meaningful rationale for its repetitive assertion that four (rather than say, two, or any other number) additional independent stations are essential to maintaining competition.").

[50] 2016 Order, ¶ 56.

[51] 2006 Quadrennial Review Order, ¶ 99.

[52] 2016 Order, ¶ 56. This competition "is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities." *Id.*

[53] *Id.*, ¶ 56, n.149.

results.[54] In this case, that same expertise has been brought to bear in reaffirming the Commission's assessment that non-network affiliated stations play a vital competitive role in local markets and that it is important to have at least an equal number of those truly independent stations to compete with the top-four rated stations (usually the major network affiliates) in markets where common ownership is permitted. In this, as in all instances concerning whether its broadcast ownership rules remain necessary in the public interest, the Commission takes account of both economic and other considerations. Petitioners have presented no basis for disturbing the Commission's decision to retain the Eight Voices Test based on its failure to perform additional economic analysis under these circumstances.

Nor has NAB made the case for reconsideration based on the Commission's decision to exclude from consideration its late-filed ex parte submission containing an economic study purporting to demonstrate that the test is "economically arbitrary," proscribing transactions that would likely be deemed procompetitive under conventional competition analysis.[55] NAB claims this decision was both erroneous and unconvincing.[56] Not so. The Commission provided a more than adequate, not to mention convincing, explanation for declining to consider the merits of an "egregiously late" filing consisting of a complex econometric study *after* NAB "knew the Report and Order had already been circulated and after there were reports that three Commissioners had voted for the item," especially when consideration would cause undue delay that "would be contrary to the Third Circuit's expectation that the Commission will move quickly to resolve this proceeding."[57] In reaching this decision, the Commission fully considered

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[54] *See* 2006 Quadrennial Review Order, ¶ 99, n.324, *citing Sinclair Broad. Group v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002).

[55] NAB Petition at 7.

[56] *Id.* at 7; *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 14-50, Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, at 2, Attach. at 3 (July 19, 2016).

[57] 2016 Order, ¶ 55, n.147.

and rejected NAB's arguments that the study was appropriately submitted because it simply provided support for statements NAB had previously made, rather than offering new arguments.[58] Given the fact that the appropriateness of the Commission's local television ownership limits "are not based simply on a structural antitrust analysis, but rather on a broader concern with promoting competition, localism and diversity" the Commission's rejection of NAB's late-filed economic study cannot be considered a material error.[59]

Further from a policy perspective, the Commission should not reconsider retention of the Eight Voices Test. Elimination of the rule, coupled with reform of the Top-Four Prohibition, would allow joint retransmission consent negotiations of major network affiliated stations in every market in the nation, even those with only a handful of television stations. This would cause incalculable adverse effects on retransmission consent negotiations with MVPDs in smaller markets, particularly for smaller MVPDs serving these smaller markets. The Commission should just say "no" to reconsideration.

## III. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT RECONSIDERATION OF THE COMMISSION'S DECISION TO ATTRIBUTE JOINT SALES AGREEMENTS IS WARRANTED

Broadcasters ostensibly competing in the same local markets have increasingly used a variety of shared services agreements, including television JSAs, to coordinate their activities. While these agreements to coordinate can result in public interest benefits, they can harm competition by having economic effects similar to mergers.[60] For instance, under cover of such

[58] *Id.*

[59] *See* 2014 FNPRM, ¶ 359, n.1108. Should the Commission now differ, however, and determine that it should have considered the study, it must provide additional notice and afford interested parties the opportunity for additional comment before reaching a decision on reconsideration of its retention of the Eight Voices Test.

[60] *See, e.g.*, *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.,* MB Docket No. 09-182, *Ex Parte* Submission of the United States Department of Justice, at 10-13 (filed Feb. 20, 2013). Given the extensive control over pricing decisions inherent in JSAs, and consequent harms to competition for advertising, DOJ recommended that the Commission count JSAs, and substantively similar agreements, as attributable ownership interests. *Id.* at 15-18.

agreements, separately owned, same market broadcasters often coordinated their retransmission consent negotiations with MVPDs. Although Congress expressly barred coordinated retransmission consent negotiations, elimination of JSA attribution would not serve the public interest because while it would provide non-commonly owned broadcasters the opportunity to explicitly coordinate their advertising activities, it would also facilitate their ability to covertly coordinate their retransmission consent negotiations outside the view of the Commission and MVPDs, in contravention of the joint negotiation prohibition.

Nexstar and NAB argue that the Commission should reconsider its decision to attribute television JSAs for four principal reasons: (i) the decision has the effect of improperly making the local television rule more stringent without showing tightening to be in the public interest; (ii) the Commission failed to consider evidence of the public interest benefits produced by JSAs submitted by Nexstar and others; (iii) the decision wrongly concluded that these arrangements confer ownership control; and (iv) the Commission misapplied relevant precedents.[61] The Commission based its decision to attribute TV JSAs on the rationale supporting its original adoption of this rule in the 2014 JSA Order. Examination of that decision, together with the determination that the Local Television Ownership Rule continues to be necessary in the public interest without alteration to reflect the attribution of television JSAs, shows that Petitioners have again failed to satisfy their burden of showing reconsideration is warranted.

First, the Commission was not, as Petitioners argue, obligated to demonstrate that tightening of the local television rule be in the public interest before deeming television JSAs attributable, and its failure to do so was not material error or omission. The Commission's charge on remand from the Third Circuit in *Prometheus III* was a procedural one – review the continued need for the underlying ownership rule as part of the examination of what interests count toward ownership – which the Commission met prior to returning to the question of

[61] NAB Petition at 11-13; Nexstar Petition at 15-24.

attribution.[62] The Commission explicitly considered whether its attribution decision changed its determination that the existing Local Television Ownership Rule should be retained with only minor modifications and concluded that it did not. The Commission explained that the component parts of the ownership rule – the numerical limits, Top-Four Prohibition and Eight Voices Test – each assume "that independently owned and operating stations are just that – independent" and that its attribution rules are "designed to reflect a determination of when stations are not truly independent, because of common ownership or other relationships that provide the ability to exercise influence or control over another station's core operating functions."[63] Importantly, the Commission recognized that "attribution of certain television JSAs, which prevents those agreements from being used to circumvent the ownership limits by compromising the independence of a same-market station, helps to ensure that the goals of the Local Television Ownership Rule are realized."[64]

In rejecting arguments that attribution of JSAs required a concomitant loosening of the ownership limits, the Commission observed that its responsibility under Section 202(h) is to ensure that the Local Television Ownership Rule continues to serve the public interest, which it had found to be the case, "not to manipulate the rule to counterbalance the attribution of

[62] *See Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) ("Prometheus III"). The Commission's 2014 decision to attribute television JSAs under which a television station (the broker) sold more than 15 percent of the weekly advertising time for another same-market television station (the brokered station), resulting in counting the brokered station toward the brokering station's permissible ownership totals, was vacated by the 3rd Circuit in Prometheus III solely on procedural grounds – the Commission's failure to at the same time determine that the Local Television Ownership Rule served the public interest. 2016 Order, ¶¶ 60-61; Prometheus III at 60. Upon concluding in the instant review that the Local Television Ownership Rule (with minor modifications) continues to serve the public interest, the Commission incorporated by reference the rationale articulated in the 2014 Television JSA Order for attribution of these agreements and re-adopted its Television JSA Attribution Rule, finding that the attribution rule serves the public interest by ensuring compliance with the broadcast ownership rules themselves. 2016 Order, ¶ 62.

[63] 2016 Order, ¶ 64 (emphasis original).

[64] *Id.* The Commission noted that the arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits, but ultimately determined that the Local Television Ownership Rule should be retained, with a minor modification to the contour standard. *Id*.

television JSAs."[65] Once the determination on the underlying ownership rule was made, the Commission reasonably proceeded to assess what constitutes ownership and, by attributing television JSAs, to close a loophole that broadcasters had been exploiting to evade its restrictions. The Commission considered and rejected arguments that the ownership limits should be relaxed because JSAs, like common ownership, produce public interest benefits.[66] Petitioners have neither raised new arguments nor shown that the Commission's reasoning was the product of a material error or omission.

Next, the Commission was not, as Petitioners maintain, obligated to take count of the public interest benefits of JSAs in its attribution determination, and its failure to do so therefore was not material error or omission.[67] The Commission considered and rejected evidence of the public interest benefits of television JSAs in the 2014 JSA Order on the grounds that it simply was *not relevant* to its decision to attribute the agreements.[68] Specifically, in arriving at its decision to attribute television JSAs, the Commission considered and rejected arguments against attribution by Nexstar and others about "the potential public interest benefits associated" with television JSAs, coupled with increased competition for broadcast television stations from non-broadcast video sources.[69] The Commission explained that while it recognized "that cooperation among stations may have public interest benefits under some circumstance, particularly in small to mid-sized markets, these potential benefits do not affect our assessment

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[65] *Id.*

[66] *Id*., ¶ 64, n.176.

[67] Nexstar and NAB both fault the Commission's determination that the potential public interest benefits of JSAs were not relevant to the attribution decision, arguing that the decision was contrary to the Commission's statutory obligations. Nexstar Petition at 15-19; NAB Petition at 11-12. Nexstar claims the Commission's refusal to consider the public interest implications of its decision to attribute television JSAs violates at least four separate statutory commands. Nexstar Petition at 16, *citing* 2016 Order, Dissenting Statement of Commissioner Pai at 192 ("2016 Order, Pai Dissent").

[68] 2014 JSA Order, ¶ 349.

[69] *Id*. The Commission found that those arguments "bear on the issue of liberalization of the local television ownership rules and not on the question of whether JSAs give the brokering station a degree of influence and control that rises to the level of attribution, which is the sole focus of our inquiry here." *Id*.

of whether television JSAs confer significant influence such that they should be attributed. Rather, any such benefits should be assessed in determining where to set the applicable ownership limit…."[70] The Commission neither ignored Petitioners' evidence, nor acted arbitrarily or capriciously in making its decision that the evidence was not relevant to the question of attribution.

Third, the Commission had more than an adequate basis for its determination that television JSAs confer ownership control. In its Petition, Nexstar argues that the 2016 Order lacked a factual basis by focusing solely on the question of the degree of influence or control television JSAs convey, without considering any evidence of stations actually exercising undue influence over another station or its programming decisions.[71] The Commission, however, has already considered and rejected the argument that its attribution decision should rest on evidence of actual detrimental influence or control. Rather, in finding that television JSAs, like radio JSAs and radio and television local marketing agreements, have the potential to convey significant influence over a station's operations,[72] the Commission specifically addressed the argument that it had failed "to recite specific instances where a brokering station exercised influence over a brokered station's programming decision."[73] The Commission noted that in upholding its attribution rules in the past, "courts have held that the Commission reasonably designed those rules to identify those interests that provide the holder with the incentive and

[70] *Id.*, ¶ 358.

[71] Nexstar Petition at 20.

[72] The Commission found that "television JSAs, like radio JSAs and radio and television local marketing agreements, have the potential to convey significant influence over a station's operations such that they should be attributable." 2014 JSA Order, ¶ 350 (crediting record evidence demonstrating that in "commercial broadcasting, programming and sales are inextricably connected"). The Commission also addressed Commissioner Pai's dissent faulting the Commission for failing "to recite specific instances where a brokering station exercised influence over a brokered station's programming decision." *Id.* at n.1081, *citing* 2014 JSA Order, Dissenting Statement of Commissioner Pai at 227 ("2014 JSA Order, Pai Dissent"). JSAs were also found to provide incentives for joint operation that are similar to those created by common ownership. *Id.*, ¶ 351.

[73] *Id*., ¶ 350, n.1081, *citing* 2014 Order, Pai Dissent at 227.

ability to influence or control the programming or other operational decisions of the licensees, rather than to address individual instances of actual influence or control."[74] Thus, the Commission considered and rejected the argument Nexstar advances that its JSA attribution decision rests on an inadequate factual basis and the Order's failure to recite specific instances of influence or control does not constitute material error or omission.

Finally, the Commission did not, as Petitioners claim, misapply precedent in reaching its attribution decision. Nexstar and NAB argue that the Television JSA Attribution Rule is inconsistent with other Commission decisions concerning influence on and control of licenses, pointing to the Commission's waiver of certain attribution rules for broadcast incentive auction participants.[75] Yet these arguments were aired and dismissed during the proceeding. Indeed, Commissioner Pai's discussion of Petitioners' same inconsistency argument in his dissent is evidence that these issues have been fairly heard, considered, and answered in the rulemaking proceeding. The Commission evaluated precedent, and found its attribution of television JSAs consistent with its recent decision to attribute radio JSAs upon finding that they and radio and television local marketing agreements have the potential to convey significant influence over a station's operations such that they should be attributable.[76] Here again, the Commission's decision was fully justified and consistent with relevant media ownership attribution precedent; its failure to reconcile its general and long-standing approach to broadcast attribution with a specific action on wireless attribution in this instance is neither material error nor omission.

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[74] *Id.*, *citing Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1139-41 (D.C. Cir. 2001).

[75] NAB Petition at 12; Nexstar Petition at 23-24, *citing* 2016 Order, Pai Dissent at 193; *Grain Mgmt., LLC's Request for Clarification or Waiver of Section 1.2110(B)(3)(IV)(A) of the Comm'ns Rules*, 29 FCC Rcd 9080, ¶¶ 13-14 (2014); *Updating Part 1 Competitive Bidding Rule, et al.*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, ¶ 21 (2015).

[76] 2014 JSA Order, ¶ 350. In addition, the Commission found television JSAs to "provide incentives for joint operation similar to those created by common ownership" and that in its experience, they are used to coordinate the operations of two ostensibly separately owned entities. *Id.,* ¶ 351.

Again, from a policy perspective, the Commission should not reconsider the ban on JSAs. Elimination of JSA attribution would facilitate the ability of broadcasters to covertly coordinate their retransmission consent negotiations outside the view of the Commission and MVPDs, in contravention of the joint negotiation prohibition.

## IV. CONCLUSION

For the foregoing reasons, the Commission should decline to reconsider its decision to retain the Local Television Ownership Rule and re-adopt its Television JSA Attribution Rule.

Respectfully submitted,

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